IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NOS.48 AND 51 OF 2001

CRIMINAL APPEAL NO.48 OF 2001

Moses Fernandes,
R/o H. No.147, Ravlo Band,
St. Cruz, Ilhas, Goa,
presently lodged in the
Central Jail, Aguada. ... Appellant.

versus

State through Public
Prosecutor. ... Respondent.

Mr. S. D. Lotlikar, Senior Advocate with Ms. S. Samant, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CRIMINAL APPEAL NO.51 OF 2001

Shri Gopal Sharma,
West Bengal, Calcutta,
preesently in custody at
Central Jail, Aguada. ... Appellant.

versus

State through Public
Prosecutor. ... Respondent.

Mr. S. N.Joshi, Advocate under Legal Aid Scheme.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM: S. J. VAZIFDAR &
P. V. HARDAS, J.

DATED: 30TH APRIL, 2003.

ORAL JUDGMENT(PER P. V. HARDAS, J.)

The Appellants/Original Accused Nos.1 and 2, have filed the present Appeal challenging their conviction for an offence punishable under Sections 302, 394 and 449 of the Indian Penal Code and sentenced to suffer imprisonment for life, Rigorous Imprisonment for 5 years and fine of Rs.5000/-, in default Rigorous Imprisonment for 1 year and Rigorous Imprisonment for 5 years respectively. in Sessions Case No.43/98, passed by the Additional Sessions Judge at Panaji, by Judgment dated 23rd July, 2001.

2. The allegations against the Appellants/Original Accused Nos.1 and 2 is that on 13th April, 1998, between 8.00 a.m. to 11.30 a.m. at Glenvilla, Kharebhat, Chorao, the Appellants along with two other Accused who are said to be absconding, entered the house of Brazinho Pereira and Celina Pereira, an aged couple, killed Brazinho Pereira by stabbing him and stabbed and strangulated Celina Pereira, ransacked their house snd took away gold ornaments, VCR etc..

3. The facts as are necessary for the decision of the Appeal are set out hereunder:-

In 1998, P.W.29,P.S.I. Anandu Naik, was attached to the Goa Police Station as a Police Sub Inspector. On 13th April, 1998, at about 7.40 p.m., he received a telephone call from P.W.22, Jane Sebastina Pereira, who had informed him about the murder of her father-in-law Brazinho Pereira and mother-in-law Celina Pereira. On receipt of the information, P.W.29, P.S.I. Anandu Naik, immediately rushed to the scene of the offence and reached at about 8.00 p.m. On entering the house, he noticed two dead bodies in the kitchen in a pool of blood. P.W.22, Jane Sebastiana Pereira, identified the bodies as that of Brazinho Pereira and Celina Pereira, her in laws. P.W.29, P.S.I. Anandu Naik, then recorded the complaint of P.W.22, Jane Sebastiana Pereira, at Exh.PW22/A. On the basis of the complaint, P.W.29, P.S.I. Anandu Naik, registered an offence vide Crime No. 14/98 under Sections 449, 302, 394 of the Indian Penal Code. After registration of the offence, P.W.29, P.S.I. Anandu Naik, returned to the scene of the offence and at about 10.30 p.m. conducted the inquest panchanama of the dead bodies. The inquest panchanama of Brazinho Pereira is at Exh. 10 and the inquest panchanama of Celina Pereira is at Exh.11. The inquest panchanama was conducted in the presence of P.W.1, Premanand P. Mahambre and another panch. The dead bodies were then referred to the Goa Medical College, Bambolim for post mortem. The post mortem on

the bodies were performed by P.W.15, Dr. Silvano Sapeco Dias. The post mortem report in respect of Brazinho Pereira is at Exh. PW15/A. The cause of death was due to haemorrhagic shock as a result of cumulative injuries 1 to 6 caused by impact of sharp pointed and cutting penetrating weapon. P.W.15, Dr. Silvano Sapeco Dias, noticed the following injuries on the dead body of Brazinho Pereira.:-

1. Stabbed penetrating injury of 1 x 3 4 cms was seen on right upper chest and was placed obliquely 6 and half cms above right nipple from lower end of the injury. Both angles are acute with tailing downwards and inwards for half centimeter. On internal examination there was a fusion of blood for right pectoral muscles and it was directed from above downwards and inwards between 4th and 5th interpostal spaces and pierced the right inner boarder of lip for one and half centimeters thus having a total depth of 7 and half cms.

2. Stabbed penetrating injury of 1 x 3/4 cms was seen on eppigestrium at front of abdomen just to right of middle line, 9 cms above naval, directed obluquely outwards with acute angles bilaterally with half cms ntailing upwards. On internal examination, there was a fusion of blood within the right rectii muscles and had a fusion of blood and had penetrating into the

peritorium at 3 sides and had pierced the mizentri and had also pierced the loop of small intestines at jejunum 14 cms from duodinal cap at two sites at a distance of 2 cms besides the other. It was directed from front to back and inwards with a total depth of 8 3/4 cms.

3. Stabbed penetrating injury of 1/4 cms x 33/4 cms was seen on the left side of epigestrium at front of abdomen to the left of mid line placed obliquely. The lower end was 5 cms from naval. Both angles are acute and there was tailing for half cms upwards and outwards. The distance between injuries no.2 and 3 was 8 cms a part from each other. On internal examinateion, there was a fusion for left rectii muscles and head pebnetrated the peritorium at two sites and head pierced the misentrory and head also pierced the mizentory. Blood vessels at greater curvateure of the stomach, the pancreas blend at its distant third and the posterior peritorium had rectoperinotim blood clots. It was directed from front to back and left and was directed inwards with a total depth of 8/ 1/4 cms.

4. Stabbed penetrating injury of 1/4 x 3/4 cms was seen on right side of abdomen with 1 cm tailing inwards and placed transversely. The inner end was 15 cms from naval and was perpendicular to naval. This injury has acute angles bilaterally. On internal examination, there was a fusion of blood within the right flank of abdominal muscles, peritonial fat and head pierced the peritonium

and head cut the dizentory at 2 places and had punctured the seacum. It was directed from left to right and inwards with a total depth of 8 and half cms.

5. Stabbed penetrating injury of 1 1/4 x 3/4 cms was seen on right lower front of abdomen placed obliquely with half cms tailing inwards. The inner end was 11 cms from naval. The distance between injuries no.4 and 5 was 4 and half cms. On internal examination, it was directed from front to back and inwards and head pierced the misentric blood vessels at 2 places and head pierced the small intestines at Illum 11 cms from seacum once, thus having a t4otal depth of 7 /3/4 cms.

6. Stabbed penetrating injury of 1 1/4 x 3 x 4 cms was seen on left loin and was placed obliquely with tailing of half cms outwards with acute angles bilaterally. The lower end was 8 cms above the illiac crust. On internal examination, there was a fusion of blood within abdominal rectii muscles and abdominal fat. It had pierced the peritonium and head cut the renal (kidney) blood vessels and urethar just below the lower pole of kidney. It was directed from left to right and inwards and a little downwards with a d/ total depth of 8 1/4 cms.

7. Abrasion of 3 x 1 cm with contusion of 4 x 2 cms was seen on left shoulder.

8. Abrasional laceration of 2 x 2 x 1/4 cms was seen on right chin front and upper force of right lower leg.

P.W.15, Dr. Silvano Sapeco Dias, also conducted the post mortem on the dead body of Mrs. Celina Pereira. The post mortem report is at Exh.PW15/B. P.W.15, Dr. Silvano Sapeco Dias, noticed the following injuries on Mrs.Celina Pereira:-

1. Stabbed penetrating injury of 1 1/4 x 1/2 cms on the right lowest chrest front, placed obliquely at the right outer aspect of abdomen 20 cms below axilary fold. It was 15 cms from right nipple. On internal examination there was a fusion of blood underneath the right flank of abdominal muscles. It had pierced the abdominal cavity's peritoneal sac and had penetrated the right lobe of lever for 2 cms. It was directed from right to left and inwards having a total depth of 8 1/4 cms. Both angles of the iujury were acute.

2. Stabbed penetrating injury of 1 1/4 cm x 1/2 cm with acute angles was seen at right loin, placed obliquely with 1/2 cms tailing outwards. Its lower end was 10 cms above illiac crust. It was directed from right to left, inwards upto the right renal blood vessels, uretha and psoas muscle. It had a total depth of 8 and half cms.

3. Stabbed penetrating injury of 1 1/4 x half cms with acute angles was seen at left loin, placed obliquely with 1 cm tailing upwards and outwards. Its lower end was 6 cms above illiac crust. It was directed from left to right and inwards upto the left

renal blood vessels, uretha and psoas muscle. It had a total depth of 8 3/4 cms.

4. Incides wound of 1 1/4 x 1/2 cms on left lower chest front along 8th and 9th intercoastal places at mid clavicular line. Its upper end was 12 cms below left nipple and lower end was 16 cms from naval.

5. Vertical defence incised wound of 5 cms parameter into 1 x 1/2 cm was seen along left thumb thumb's pulp and distal and proximal phalangalial aspects directed inwards.

6. Abrasion 3 x 1 cm on mid nose front.

7. Abrasion 3 x 2 cm on left cheek.

8. Abrasion with wounds of 3 x 1 cm on right side of upper lip.

9. Abrasion with bruise with 1/8th x 1/cm on left side of chin.

10. Abrasion with bruise of 1 x 1 cm on left chin angle of face.

11. Abrasion with bruise of 1 x 1/2 cm on right mid outer aspect of neck.

12. Abrasion 1 x 1/2 cm on right ear lobule.

13. Abrasion 3 x 2 cms on right outer aspect of elbow.

4. The cause of death was due to manual strangulation which was necessarily fatal because of the injuries 1 to 3 which by themselves were fatal in the

ordinary course of nature. The blood group of Brazinho Pereira could not be determined while the blood group of Celina Pereira was "AB" positive. The certificates regarding the blood group of the deceased is at Exh. PW15/C and PW15/D.

5. P.W.29, P.S.I. Anandu Naik, recorded the scene of the offence panchanama which is at Exh.PW6/A. The scene of the offence panchanama was recorded in the presence of P.W.6, Pandurang Bandodkar, and another panch. At the time of recording of the scene of offence panchanama apart from the panch witnesses, P.W.23, R. K. Remedios, a photographer and P.W.24, Manohar D. Joshi,, Scientific Assistant were also present. P.W.24, Manohar D. Joshi, examined the glasses, wall clock and took finger prints from the same. From the scene of offence, a pair of chappal, one gold chain with cross(M.O.4), one chappal of left leg(M.O.5) and one chappal(M.O.6) of right leg, one coin of two rupees(M.O.8), one ferry boat ticket(M.O.9), a string type clock(M.O.10), two glasses(M.O.14) and a wall clock(M.O.15) were attached.

6. On the next day, the clothes of the deceased(M.O.12) were attached vide attachment panchanama at Exh.PW3/A in the presence of P.W.3, Mohan K. Korgaonkar. The sketch at Exh.PW15/A was drawn by

P.W,25, R. C. Hegde, a Junior Engineer in the P.W.D. Thereafter, on 17th April, 1998, P.W.29, P.S.I. Anandu Naik, handed over the investigation to P.W.30, P.I. Mohan Karekar. Original Accused No.2, Gopal Sharma, came to be arrested on 1st September, 1998 by P.W.30, P.I. Mohan Karekar at Calcutta. As per the evidence of P.W.29, P.S.I. Anandu Naik, during the interrogation of Accused No.2, Gopal Sharma, the name of Accused No.1, Moses Fernandes, transpired. Accused No.1, Moses Fernandes, was ultimately arrested from the house of his mother-in-law where he was found to be hiding in a cupboard.

7. During investigation, Accused No.2, Gopal Sharma, is alleged to have made a statement that he would show the place where he had kept the Video Cassette Recorder. The recovery was made in the presence of P.W.3, Mohan K. Korgaonkar. The recovery panchanama is at Exh.PW3/A. The VCR was ultimately found in the house belonging to P.W.27, K. Sunder, who is the father of the other absconding Accused. The said VCR was attached under a panchanama and the VCR is M.O.23. Certain gold ornaments were attached by one Narayan Shetty. These ornaments were weighed in the presence of a goldsmith Ramesh Archarya. The ornaments attached were 8 gold bangles(M.O.24) and 2 bangles with rose petal(M.O.25).

8. P.W.30, P.I. Mohan Karekar, visited the scene of offence and in the presence of the panchas attached a cigarette butt.and took clippings of blood stains from the bedroom of the house of the deceased. The proceedings were recorded in the panchanama at Exh.PW7/A in the presence of P.W.7, Narayan G. Kerkar. P.W.30, P.I. Mohan Karekar, also attached the Provident Fund record of Accused No.2, Gopal Sharma, at Exh.PW29/B. P.W.30, P.I. Mohan Karekar, attached the register of Udipi Hotel where Accused No.2, Gopal Sharma, was residing earlier. The said register(M.O.26) was attached in the presence of P.W.5, Romeo Dias. On 1st September, 1998, Accused No.2, Gopal Sharma, came to be arrested by P.W.30, P.I. Mohan Karekar, at Calcutta. The Original Accused No.1, Moses Fernandes, came to be arrested on 8th September, 1998 from the house of his mother-in-law. The Accused No.1, Moses Fernandes, is alleged to have made a disclosure statement in respect of two scooters which is at Exh.PW2/A in the presence of P.W.2, Kanta P. Parvatkar. The Accused No.1, Moses Fernandes is also alleged to have made a disclosure statement at Exh.PW2/B that he would point out the gold ornaments and accordingly, the wife of the Accused No.1, Moses Fernandes had produced four gold bangles(M.O.19), one gold chain(M.O.20), three pairs of earrings(M.O.22) and two gold finger rings(M.O.21. The Accused No.1,

Moses Fernandes, is also alleged to have made a disclosure statement at Exh.PW4/A in the presence of P.W.4, Pandurang de Sa volunteering to discover the weapon and the clothes. Accordingly, knife(M.O.16) was found in the rafter of the ceiling of the house and knife(M.O.16A) was found wrapped in the clothes namely bushirt(M.O.16) and shirt(M.O.16D). The muddemal articles were sent to the Chemical Analyser with the forwarding letter Exh.PW30/E.

9. According to prosecution, specimen finger impressions of Accused No.2, Gopal Sharma, were obtained during the investigation and the specimen finger impressions of Accused No.2, Gopal Sharma, were examined by the Finger Print Expert, P.W.28, G. M. Patil, who by his report at Exh.PW24/D opined that the finger prints developed on the wall clock and glasses are identical with the left thumb right index and finger impression of Accused No.2, Gopal Sharma. The reasonings for the finding is at Exh.PW26/C and the enlarged photographs are at Exh.PW28/C colly. The negatives of the photographs is at Exh.PW28/C colly. After completion of the investigation, a charge-sheet against the Appellants came to be filed.

10. The learned Sessions Judge, Panaji, vide Exh.4

framed a charge against the Appellants for an offence punishable under Sections 302, 449, 394 r/w 34 of the Indian Penal Code. The Appellants/Accused denied their guilt and claimed to be tried. The prosecution in support of its case examined 30 witnesses.

11. The evidence against the Appellants consists of circumstantial evidence. The learned Trial Court in para 12 of the Judgment has stated that the prosecution case rests on circumstantial evidence and the circumstances are (1) Accused Nos.1 and 2, Moses Fernandes and Gopal Sharma, were working in the restaurant of P.W.21, Gasper Moraes and they were acquainted with the deceased Brazinho Pereira and Celina Pereira. (2) Recovery of the scooters, knife and gold ornaments at the instance of Accused No.1, Moses Fernandes. (3) Recovery of VCR at the instance of Accused No.2, Gopal Sharma and (4) Finger print of the Accused found on the glass at the scene of the offence.

12. In respect of the first circumstance, the learned Trial Court found that the prosecution had been able to prove the first circumstance namely that the Appellants were acquainted with the deceased. In respect of the second circumstance namely recovery of the scooters, the learned Trial Court found that the recovery of the scooters cannot be linked with the

commission of the crime. Moreover, the learned Trial Court held that it could not be said that the scooters were recovered at the instance of Accused No.1, Moses Fernandes, since they were found parked in the usual place meant for parking. The learned Trial Court in respect of the circumstance No.2 namely recovery of the two knives and the clothes has held that the prosecution has been able to prove the recovery of knives and clothes attached vide panchanama Exh.PW4/A. Again, in respect of circumstance No.2 namely recovery of the gold ornaments at the instance of Accused No.1, Moses Fernandes, the learned Trial Court has accepted the recoveries and the identification thereof by P.W.22, Jane Sebastiana Pereira, that the ornaments belonged to the deceased. In respect of circumstance No.3 namely recovery of VCR at the instance of Accused No.2, Gopal Sharma, the learned Trial Court relying on the evidence of P.W.22, Jane Sebastiana Pereira, P.W.23, R. K. Remedios and P.W.27, K. Sunder, has held that the prosecution has proved the recovery of the VCR and the identification thereof as belonging to the deceased. In respect of the circumstance No.4 namely the finding of the finger print of Accused No.2, Gopal Sharma, on the glass at the scene of offence, the learned Trial Court has held the circumstance as proved against Accused No.2, Gopal Sharma. The learned Trial Court, therefore, came to the conclusion that the prosecution had been

able to establish and prove the charges against the Appellants and accordingly convicted and sentenced them as aforestated.

13. Mr. S. D. Lotlikar, learned Senior Counsel appearing for Original Accused No.1, Moses Fernandes, has urged before us that the prosecution, in so far as Accused Bo.1, Moses Fernandes, is concerned has not been able to establish the second circumstance, namely the recovery of the ornaments, the knives and clothes at the instance of the Appellant No.1. The learned Senior Counsel appearing for the Original Accused No.1, Moses Fernandes, has further urged that identification of the ornaments has not been proved by the prosecution as the ornaments of similar design are available in the market and the Police had not mixed these said ornaments with other similar ornaments and, therefore, the identification by P.W.20, Joyce Moraes, and P.W.22, Jane Sebastiana Pereira has not been proved. Thus, according to the learned Senior Counsel appearing for Accused No.1, Moses Fernandes, the Accused No.1, Moses Fernandes, is entitled to be acquitted.

14. Mr. S. N. Joshi, learned Counsel appearing for Accused No.2, Gopal Sharma, has submitted that the VCR alleged to have been attached on the basis of the

information given by the Accused No.2, Gopal Sharma, has not been established to be the VCR which was stolen. He has submitted that in the FIR, no description of the VCR is given and also the witnesses do not claim to have identified the VCR on the basis of any particular identifying mark. He has further submited that there is no evidence that specimen finger impressions of Accused No.2, Gopal Sharma, had been taken and, therefore, the finding of the Finger Print Expert that the glass which was found at the scene of the offence which bore the finger impression of Accused No.2, Gopal Sharma, cannot be relied upon.

15. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the Accused No.1, Moses Fernandes,, has placed reliance on a Division Bench Judgment of this Court in **Pandurang Mohite** v. **State of Goa** reported in 2002 All MR(Cri.) 1733. The reliance is placed at para 65 of the report.

16. Mr. S. N. Sardessai, learned Public Prosecutor appearing for the State has urged that the circumstances appearing against the Appellants has been proved by the prosecution and, therefore, according to him, the conviction and sentence can be sustained.

17. Mr. S. N. Sardessai, learned Public

Prosecutor appearing for the State has also maintained that the circumstances as are enumerated by the learned Trial Court in para 12 of the Judgment are the only circumstances on which the prosecution has placed reliance. We, therefore, propose to examine the evidence to determine whether the prosecution has proved all the circumstances and whether the circumstances so proved unerringly point to the guilt of the Accused and exclude every hypothesis of the innocence of the Accused.

18. In respect of the first circumstance namely that the Accused Nos.1 and 2 were acquainted with deceased Brazinho and Celina Pereira, the evidence material for proving this circumstance is the evidence of P.W.21, Gasper Moraes, P.W.20, Joyce Moraes and P.W.22, Jane Sebastiana Pereira.

19. P.W.22, Jane Sebastiana Pereira, states that she was married to Glen Pereira on 3rd January, 1998. P.W.20, Joyce Moraes, is her sister and P.W.21, Gasper Moraes, is the husband of P.W.20, Joyce Moraes. P.W.21, Gasper Moraes, runs a restaurant where both the Accused were employed as cooks. The evidence of P.W.22, Jane Sebastiana Pereira suggests that Accused No.1, Moses Fernandes, was present on the day of her engagement and Accused No.2, Gopal Sharma was present in the car when

P.W.22, Jane Sebastiana Pereira along with her in laws had gone to the Baga Beach for an outing. The evidence also suggests that at her wedding, Accused Nos.1 and 2, Moses Fernandes and Gopal Sharma, were present. She states that after her marriage, she started residing with her in laws in the house at Chorao. Her husband had gone to Kuwait somewhere at the end of February, 1998. She was working in the Global Trust Bank at the Panaji Branch. On 30th April, 1998, at about 6.20 p.m., her sister, P.W.20, Joyce Moraes informed her on telephone that P.W.20, Joyce Moraes, had received a call from Chorao informing her that the house of the deceased was in darkness and the neighbours were suspecting something. P.W.22, Jane Sebastiana Pereira, therefore, immediately went to the beauty parlour of P.W.20, Joyce Moraes, which is situated in the Cardozo Building above the restaurant runned by P.W.21, Gasper Moraes. After crossing the ferry at Ribandar, they reached the house of the deceased and saw that the house was in darkness as no lines had been switched on. They went upto the varandah gate and found that the varandah gate which is otherwise variably locked had no lock. They opened the gate and went inside while the people who had gathered remained outside. On opening the door, they found a big pool of blood on the floor and apprehending that the assailants may be inside the house, both of them ran out of the house. P.W.20, Joyce Moraes, and P.W.22, Jane

Sebastiana Pereira, thereafter went to the house of a neighbour and informed the Police. One policeman had come to the scene of the offence and P.W.20, Joyce Moraes, and P.W.22, Jane Sebastiana Pereira, accompanied by the policeman went inside the house. On searching the house, they found the two dead bodies. On switching the electric lines, they found that the entire house had been ransacked. She also noticed the suit cases were opened with the contents dumped on the mattresses. She accordingly gave the complaint at Exh.PW22/A and in the complaint, gave a description of the articles which she found missing. The description of the articles from the complaint at Exh.PW22/A reads thus:-

1. 6 pair of gold earings of differeent design w/Rs.8,000/-.
2. one gold neckless w/Rs.10,000/-.
3. 6 gold bangles w/Rs.12,000/-.
4. one gold neckless with sticks w/Rs.20,000/-.
5. one gold chain with pandent w/Rs.15,000/-.
6. one gold chain with cross w/Rs.10,000/-.
7. 2 gold finger rings w/Rs.6000/-.
8. 2 wrist titan watch one ladies & one gents w/Rs.3000/-.
9. one video cassette player black colour w/Rs.8000/-.

20. P.W.20, Joyce Moraes, sister of P.W.22, Jane Sebastiana Pereira, corroborates P.W.22, Jane Sebastiana Pereira, regarding what transpired on 13th April, 1998 regarding the telephone call which she made and the discovery of the dead bodies in the house. She then also corroborates about Accused No.2, Gopal Sharma, accompanying them to the house of the deceased for lunch. She also states that the deceased were acquainted with Accused No.2, Gopal Sharma, as the deceased couple used to frequently come to the restaurant and deceased Celina Pereira used to like the chinese dishes prepared by Accused No.2, Gopal Sharma. She also states that once Celina Pereira had asked Accused No.2, Gopal Sharma, to teach her how to prepare certain chinese dishes. P.W.22, Jane Sebastiana Pereira, further states that by end of March, 1998, Accused No.2, Gopal Sharma, had expressed his desire that he intended to leave the job and go to Bombay. In respect of Accused No.1, Moses Fernandes, P.W.20, Joyce Moraes, states that Accused No.1, Moses Fernandes, worked in the restaurant till first week of January, 1998 and thereafter, left his job. She has also stated that the deceased couple was acquainted with Accused No.1, Moses Fernandes.

21. P.W.21, Gasper Moraes, also corroborates P.W.20, Joyce Moraes and P.W.22, Jane Sebastiana Pereira

that deceased Celina Pereira was acquainted with Accused No.2, Gopal Sharma.

22. There is nothing in the cross-examination of P.W.20, Joyce Moraes, P.W.21, Gasper Moraes and P.W.22, Jane Sebastiana Pereira to discredit their version that the deceased couple namely Brazinho and Celina Pereira were acquainted with Accused Nos.1 and 2, Moses Fernandes and Gopal Sharma. Therefore, according to us, the prosecution has been able to prove the first circumstance namely that deceased Brazinho and Celina Pereira were acquainted with Accused Nos.1 and 2, Moses Fernandes and Gopal Sharma.

23. Turning to the second circumstance namely recovery of scooters, knives and gold ornaments at the instance of Accused No.1, Moses Fernandes, a reference may usefully be made to the Judgment of the learned Trial Court where the Trial Court in para 17 has held that the recovery of the scooters is of no assistance to the prosecution. Therefore, we do not propose to dilate on the evidence of P.W.2, Kanta P. Parvatkar, the panch witness relating to the memorandum of recovery of scooters at Exh.PW2/A. The recovery of the ornaments is deposed to by P.W.2, Kanta P. Parvatkar. P.W.2, Kanta P. Parvatkar, states that on 8th September, 1998, he

was called to the Police Station to act as a panch. The first panchanama was regarding the memorandum of discovery of two scooters at Exh.PW2/A. This panchanama was recorded between 8.30 a.m. to 9.00 a.,m. P.W.2, Kanta P. Parvatkar, then states that he was again called by the Police on the same day at about 6-00 p.m. at the Police Station. The Accused No.1 is alleged to have made a statement that he would point out the gold ornaments which he kept in his house. According to P.W.2, Kanta P. Parvatkar, the other panch by name Kusta Salelkar, was also present. P.W.2, Kanta P. Parvatkar, states that they went in a jeep to the house of the Accused where the Accused asked his wife to bring out "those things which he had given to her". P.W.2, Kanta P. Parvatkar, says that the wife of Accused No.1, Moses Fernandes, accordingly brought out four gold bangles, one gold chain, two finger rings, three pairs of earings, the articles which are said to have been produced by the wife of the Accused are four gold bangles(M.O.19), one gold chain(M.O.20), three pairs of earings(M.O.22) and two finger rings(M.O.21). In the cross-examination, this witness has admitted that he had gone to the Police Station along with Kusta. He has also admitted that it was the first time that he stood as a panch at Ribandar Police Station. He has given the following admission "some times I also act as a panch along with Kusta. Whenever the Police needs me I have

not called from my house. When I have called whenever I was found". He has also admitted in the cross-examination that the fact that the gold ornaments were sealed in an envelope is not mentioned in the panchanama. From the evidence, it transpires that during the recording of the examination-in-chief of this witness, the ornaments had not been sent to the Court by the Police and as such, the examination-in-chief of this witness after it was partly recorded was deferred. Thereafter, it appears that the property was received by the Court which were in sealed brown colour envelope bearing the signature of this witness. P.W.30, P.I. Mohan Karekar, in the cross-examination has admitted "I was interrogating A-1 from 9 a.m. to 18 hours(6 p.m.) about the gold ornaments. He further states that after the wife of A-1 had brought the gold ornaments and the ornaments were weighed by the goldsmith he did not place them in any envelope. He corrected that statement immediately and stated that he had attached those gold ornaments and had packed them in an envelope and while producing the same in the Court they were again weighed by the same goldsmith and sealed in the presence of Nazir". In the further cross-examination, he has also admitted that immediately on attachment he had put the gold ornaments in the envelope and had taken the signatures of the panchas. He admitted the fact about sealing of the ornaments in an envelope is not mentioned

in the panchanama.

24. P.W.20, Joyce Moraes, states "at the time of the incident the gold ornaments were not shown to me but the same were shown after six months after incident at the Police Station". She has further admitted in the cross-examination that "it was at the Old Goa Police Station I was called to identify the gold ornaments. When I went to Police Station the Police brought the gold oprnaments and placed them on the table. I do not remember whether the Police told me anything before the Police brought the gold ornaments. She has further admitted in the cross-examination that the Police brought the gold ornaments either in a plastic bag or in a paper.

25. P.W.30, P.I. Mohan Karekar, in the cross-examination has admitted that he did not feel it necessary to obtain the permission of the Magistrate before showing the gold ornaments to P.W.20, Joyce Moraes. He has also admitted that the panch witnesses were not present at the time of opening the envelope which contained the gold ornaments which had been attached. He has given the following admission "I am not aware that the same procedure for the identification of a person is to be made for the identification of an article. It is true that while identifying the gold

ornaments they should be placed with other gold ornaments. There was no panchanama carried out for identification of the gold ornaments".

26. From the evidence of these witnesses, it is clear that for the attachment of the gold ornaments allegedly on the disclosure statement of Accused No.1, Moses Fernandes, the prosecution had examined P.W.2, Kanta P. Parvatkar, as a panch. On P.W.2, Kanta P. Parvatkar's own admission he had earlier appeared as a panch witness for the Police and it appears from the admission given in the cross-examination that he was a willing and pliable witness. This being the position, the evidence of P.W..I. Mohan Karekar, needs to be scrutinised very carefully. From the admissions given by P.W.30, P.I. Mohan Karekar, it is apparent to us that this witness is not a truthful witness. He claims that the gold ornaments after they were produced by the wife of Accused No.1, Moses Fernandes, were not sealed. He corrected himself by stating that the gold ornaments were put in a brown colour envelope and sealed. He also admits that the ornaments were shown to P.W.20, Joyce Moraes. Apparently, it means that the seals were broken and the ornaments were shown. It was done neither in the presence of the panchas nor a panchanama to this effect was drawn. He then states that before the

property was produced in the Court, he had resealed the ornaments again. When the envelopes were produced in the Court they bore the signature of the panch witness P.W.2, Kanta P.Parvatkar. In view of these admissions, it is extremely hazardous to place any reliance whatsoever on the testimony of P.W.30, P.I. Mohan Karekar regarding the attachment of the ornaments. Surreptitiously opening the sealed envelopes and resealing them again with the signature of the panch is nothing but a dishonest attempt on the part of this witness to mislead the Court in believing that the ornaments had been sealed imnmediately. In fact, P.W.20, Joyce Moraes, states that the ornaments which were shown to her were kept either in a plastic bag or wrapped in paper. She makes no reference to the ornaments being kept in a sealed cover. The evidence, therefore, according to us falls woefully short for convincing the Court the truthfullness of the assertion that the ornaments namely four gold bangles(M.O.19), one gold chain(M.O.20), three pairs of earrings(M.O.22) and two finger rings(M.O.21) had been seized in pursuance to a statement made by Accused No.1, Moses Fernandes.

27. The evidence regarding identification of the ornaments also appears to us to be extremely vague. The ornaments were not previously identified by mixing the ornaments with the ornaments of similar design. P.W.22,

Jane Sebastiana Pereira, has identified the ornaments. However, she states "I identified M.O.20 as the chain of my mother-in-law. I have also a similar chain and which was missing and this chain could be either mine or of my mother-in-law". In the First Information Report, Exh.P.W.22/A, no description either of the weight of the ornaments or of the design of the ornaments is given. The witnesses also do not claim particularly P.W.22, Jane Sebastiana Pereira and P.W.20, Joyce Moraes, of having identified the ornaments either on the basis of any particular identifying mark or the uniqueness of the design of the ornaments. Therefore, a mere ipse dixit of P.W.20, Joyce Moraes and P.W.22, Jane Sebastiana Pereira that the ornaments belonged to the deceased cannot be accepted to lead to an inference that it was a a stolen property. P.W.22, Jane Sebastiana Pereira, has admitted in her cross-examination "it may be that gold ornaments and VCR are available in the market but I recognise them as mine". She has further admitted in the cross-examination that "it is not true that I don't have any bills in respect of gold ornaments". The bills unfortunately regarding the purchase of gold ornaments were not produced during trial. We have already held that the evidence in respect of the recovery is extremely doubtful and does not inspire the confidence of the Court. In the cross-examination of these witnesses, on behalf of Accused No.1, Moses Fernandes,

it was suggested that the ornaments belonged to the wife of Accused No.1, Moses Fernandes. However, the Accused has not stated anything of the ownership of the ornaments either in the Statement under Section 313 of Criminal Procedure Code nor has he led any evidence by examining his wife. The Trial Court has directed the return of the ornaments and in the absence of the Accused establishing that the ornaments belonged to him, we do not propose to interfere with the Order regarding the return of the property. We have, however, firmly come to a conclusion that the prosecution has not been able to establish that the ornaments referred to above have been seized from the house of the Accused on the basis of the information given by the Accused. Therefore, according to us, the second circumstance relating to the seizure of the ornaments at the instance of Accused No.1, Moses Fernandes, has not been proved at all.

28. The Division Bench Judgment of this Court in **Pandurang Mohite** v. **State of Goa** (supra) at page 65 has held thus-

> "Chandrakant in his deposition at Exh.27 stated that he would be able to identify the golden chain and wrist watch and he identified the Articles No.14 and 13 as those belonging to Sham. Learned Addl.P.P. has therefore argued that when

> these articles belonging to Sham were found at the instance of the accused, conclusion can be drawn that the accused came into possession of these articles only after committing murder of Sham. It is already pointed out that the evidence regarding discovery of these articles at the instance of the accused, is not believable. The witness is identifying the golden chain. He only says he identifies it and does not say on what basis he is identifying it. So far the wrist watch he states that it is of Titan make, is of black dial, of gold frame and having black leather belt is not sufficient to hold that the witness has properly identified the wrist watch as that belonging to his son Sham. Because it was already shown to him at the time of investigation without having test identification".

29. The ratio of the aforesaid Division Bench Judgment of this Court squarely applies to the facts of the present case.

30. Turning to the second circumstance regarding the seizure of the two knives(M.O.16A and M.O.16B) and the clothes, bushirt and jeans(M.O.16C and M.O.16D), at the instance of Accused No.1, Moses Fernandes, the prosecution has examined P.W.4, Pandurang de Sa. P.W.4, Pandurang de Sa, states that he was called to the Police Station on 11th September, 1998. Accused No.1, Moses Fernandes, had volunteered to disclose a knife which he

had kept on the rafter of his house and the clothes. Accordingly, the Accused along with the panch and the Police went to the house of the Accused and the Accused No.1, Moses Fernandes, produced a knife which was on the rafter. The said knife is M.O.16B. From the cupboard, the Accused took a shirt and showed the jeans which were kept for drying outside. The Accused then showed a plastic bag which was kept at the rear of the house which contained a shirt and a knife was wrapped in that shirt. The knife found wrapped in the shirt is M.O.16A. The Police accordingly attached the knives and the clothes by a panchanama which is at Exh.PW4/A. In the cross-examination, he has admitted that when the Police called him, he was along with Sarpanch by name Kusta Salelkar. The said Kusta Salelkar as admitted by P.W.2, Kanta P. Parvatkar, was a a panch witness to Exh.PW2/A and PW2/B. This witness has further stated "it was Kusta Salelkar who took me to the Old Goa Police Station. This Kusta Salelkar told me that I have to be a witness and that is the reason he took me". He has again admitted that "at this time, when I came to know the case in which I had to stand as a witness Mr. Salelkar was present". These witnesses further stated that when he went to the Police Station he was sitting on a bench. Thereafter, the Accused was brought from a lock-up. The Police asked questions to Accused No.1, Moses Fernandes, and then he was told (P.W.4, Pandurang)

that he has to stand as a panch witness for the recovery of a knife and the clothes, Incidently, a reference to the panchanama would show that this witness was called to the Police Station to serve as a panch witness in order to recover weapons and clothes of Accused No.1, Moses Fernandes. The panchanama thereafter recites about the statement of Accused No.1, Moses Fernandes relating to discovery. It would thus appear that the Police were aware and the statement of the Accused No.1, Moses Fernandes before the panch was a staged managed affair. In the further cross-examination, it is admitted that he does not remember whether the house shown by Accused No.1, Moses Fernandes, was of tiled roof or of cement cojncrete. He has also admitted that there was no mention of the shirt being blood stained. This witness has contradicted about the place where the jeans was found.

31. P.W.30, P.I. Mohan Karekar, states that it was at about 2.00 p.m. on 11th September, 1998, that Accused No.1, Moses Fernandes, made disclosure about gold and weapons. The panchanama at Exh.PW4/A commenced at 4.00 p.m. and concluded at 5.00 p.m. From the evidence of P.W.30, P.I. Mohan Karekar, it is apparent that the Police had prior knowledge where the Accused had kept the weapons and the clothes. He further states that this disclosure was made at the Ribandar Out Post.

P.W.,30, P.I. Mohan Karekar, states that the jeans was removed by Accused No.1, Moses Fernandes, from the cupboard. According to P.W.4, Pandurang de Sa, the said jeans was outside the house kept for drying. P.W.30, P.I. Mohan Karekar, has stated that the plastic bag in which a knife was found wrapped in a shirt was in the right side of the house and inside the house. P.W.4, Pandurang de Sa, has stated that the plastic bag was in the courtyard.

32. From the evidence of P.W.4, Pandurang de Sa, and P.W.30, P.I. Mohan Karekar, it is apparent that there are discrepancies on material aspect. From the evidence of P.W.30, P.I. Mohan Karekar, it transpires that the Accused had made a disclosure statement at 2.00 p.m. The panchanama regarding the disclosure statement at Exh.PW4/A commenced at 4-00 p.m. Thus, the Police were aware about the place where the alleged knives and the clothes were kept. Despite this, the Police then staged and managed a disclosure statement in the presence of P.W.4, Pandurang de sa and then proceeded to the place for seizure. P.W.4, Pandurang de Sa, claim of being present is also doubtful because he was brought to the Police Station by one Kusta Salelkar who admitted that he was known to the Police. Kusta Salelkar, is associated of the other recoveries in this case. The discrepancy regarding the place where certain articles

are found is apparent from the perusal of the evidence of P.W.4, Pandurang de Sa and P.W.30, P.I. Mohan Karekar. According to us, therefore, it would be extremely hazardous to rely on the evidence of P.W.4, Pandurang de Sa and P.W.30, P.I. Mohan Karekar regarding the attachment of the two knives(M.O.16A and M.O.16B) and the clothes at M.O.16C and M.O.16D. P.W.15, Dr. Silvano Sapeco Dias, in his evidence has stated that the knife which was found hidden in the rafter was not the weapon of assault. He has opined that the other knife found wrapped in the shirt could have caused injuries 1 to 6. As per the report of the Chemical Analyser Exh.PW24/I colly, the jeans, shirt and knife were stained with blood. However, the group could not be determined. According to us, therefore, in the absence of any reliable and convincing evidence, the prosecution has not established that two knives and clothes were attached at the instance of the Accused. Therefore, the second circumstance according to us, is not proved as against Accused No.1, Moses Fernandes.

33. Coming to the recovery of VCR at the instance of Accused No.2, Gopal Sharma, the prosecution in order to establish the same has examined P.W.3, Mohan K. Korgaonkar. P.W.3, Mohan K. Korgaonkar, states that the second panchanama was done on 15th September, 1998 at Upandar, Karnataka State. As rightly submitted by

the learned Public Prosecutor appearing on behalf of the State, the VCR was not attached in pursuance to a disclosure statement. The VCR was attached from one Mr. K. Sundan in Karnataka in the presence of P.W.3, Mohan K. Korgaonkar and one Sunil Tari. The VCR is M.O.23. The prosecution has examined Mr. K. Sundan, P.W.27, who states that his son Yatish Shetty had come home on 15th April, 1998 with a friend whom P.W.27, K. Sundan identifies as Accused No.2, Gopal Sharma. He further states that Accused No.2, Gopal Sharma, while leaving the house had left a bag which he had brought stating that he would return from Mangalore and collect the bag. Thereafter, the Police attached the VCR. He states in the cross-examination that besides the Police, the Accused no one else was present at that time. In the cross-examination, he has further admitted that he did not state to the Police that the Accused had stated that he was coming to Mangalore and when he returns he will take the bag. From this evidence, it is difficult to come to a conclusion that the VCR belonged to Accused No.2, Gopal Sharma and he had kept it with P.W.27 K, Sundan. Even otherwise, the identification of the VCR according to us by P.W.20, Joyce Moraes, and P.W.22, 305e Sebastiana Pereira is not established as in the FIR no description of the VCR was given nor do the witnessses state that they have identified the VCR on the basis of any particular identification mark.

Therefore, according to us, this circumstance of the recovery of the VCR does not assist the prosecution case at all.

34. Coming to the last circumstance regarding the finding of the finger print of Accused No.2, Gopal Sharma, on the glass bottle, according to us, there is no evidence regarding the specimen finger prints of the Accused having been taken. P.W.30, P.I. Mohan Karekar, in his examination-in-chief does not state that he had taken the specimen finger print of Accused No.2, Gopal Sharma. He does not state that he had forwarded the specimen finger prints to the Finger Print Expert, P.W.28, G. M. Patil. P.W.24, Manohar D. Joshi, only states that on 9th September, 1998, he had received the finger impression slip of both the Appellants from Old Goa Police Station and had forwarded the same to the Finger Print Bureau, Pune for comparison. There is no evidence whatsoever of specimen finger prints of Accused No.2, Gopal Sharma having been taken by the Police. Curiously, the specimen finger prints have not been taken in the presence of the panchas and no panchanama was drawn. It is extremely unfortunate that this important piece of evidence is not proved and the importance of this circumstance has been completely whittled down by the lackadaisical attitude of the Police Officers. The report of the Finger Print Expert,

P.W.28, G. M. Patil, does establish that the finger prints found on the glass matched with the specimen finger prints sent to him by the Old Goa Police Station. However, the prosecution does not establish a nexus between the specimen finger prints of the Accused and the specimen finger prints sent to P.W.28, G. M. Patil. In the absence of that, according to us, no weight has been attached to the report of the Finger Print Expert, P.W.28, G. M., Patil. Therefore, according to us, the fourth circumstance regarding the finding of the finger prints of Accused No.2, Gopal Sharma, on the glass at the scene of offence has not been established.

35. We have given our anxious consideration to the evidence on record and we are unable to agree with the findings arrived at by the learned Trial Court. As pointed out by us, the lacunae in the prosecution evidence has been completely overlooked by the learned Trial Court while recording the conviction. The conviction and sentence of the two Appellants, therefore, according to us, is unsustainable and deserves to be quashed and set aside.

36. For the reasons stated in the earlier paragraphs, we maintain the Order of disposal of the

return of the articles to P.W.22, Jane Sebastiana Pereira,

37. In the result, therefore, the Appeals are allowed. The conviction and sentence for the offences punishable under Sections 302, 394 and 449 of the Indian Penal Code and sentenced under Section 302 to undergo imprisonment for life, under Section 394 to undergo Rigorous Imprisonment for 5 years and also to pay a fine of Rs.5000/- in default of payment of fine to undergo Rigorous Imprisonment for one year and under Section 449 to undergo Rigorous Imprisonment for 5 years which were ordered to run concurrently as passed by the Additional Sessions Judge, Panaji, by Judgment dated 27th July, 2001 in Sessions Case No.43/98 are quashed and set aside and the Appellants are acquitted of the aforesaid charges. The Appellants be released forthwith, if not wanted in any other case.

S. J. VAZIFDAR, J.

P. V. HARDAS, J.

RD.